United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Signed

76-4248

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WILLIAM GELLER and DORIS GELLER,

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

B

ON APPEAL FROM THE DECISION OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Tax Court used the correct standard as to burden of proof in determining that taxpayers failed to report income of $203,612.78 in 1965 and $24,151.25 in 1966.

2. Whether the Tax Court used proper standards in weighing the evidence of fraud and in finding that some part of the deficiencies determined for 1965 and 1966 were due to fraud.

3. Whether the record evidence is, applying correct standards, sufficient to support the findings of the Tax Court.

STATEMENT OF THE CASE

This appeal involves deficiencies in federal income taxes and additions to the tax assessed against taxpayers[1/] in the following amounts (R. A1):[2/]

Year	Deficiency	Additions to Tax (Sec. 6653(b))
1965	$111,123.57	$55,561.79
1966	5,598.89	2,799.45

The memorandum findings of fact and opinion of the Tax Court (Judge Quealy) together with its decision in this suit was filed on August 18, 1976, and is reported at P-H Memo T.C., par. 76,257. The taxpayer filed a timely notice of appeal on November 5, 1976. (R. iii) Jurisdiction is conferred upon this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts relevant to this appeal are as follows:

During 1965 and 1966, William Geller was a practicing medical doctor, with offices located at 135 Ridge Street, New York, New York. (R. A14-a.) In February, 1958, he was indicted for income tax evasion. (Ex. R.) He pleaded guilty to the charges for taxable years 1953 and 1954. (R. A14.) In July, 1963, and in September, 1964, he offered to compromise the federal income tax liabilities which at that time were $170,414.67, plus interest. (R. A14.) In support of the offer, he filed statements of financial condition (Form 433) with the Commissioner of Internal Revenue which indicated he had assets worth $650 and liabilities, not

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1/ Doris Geller is a party hereto by virtue of having filed a joint return. Since the actions in issue are those of William Geller (for which reason no fraud was asserted against Doris), he will be referred to hereinafter as taxpayer.

2/ "R." references are to the separately bound record appendix.

including federal income taxes, of $30,000. (R. A14-a-A15.) He did not have sufficient income to necessitate the filing of federal income tax returns for 1956 through 1963, inclusive. (R. A14-a.)

Taxpayer, his wife Doris, and his sister Regina Strasfeld, incorporated the 2377 Creston Corporation (hereinafter sometimes referred to as the corporation) on December 28, 1950, and each was named in the certificate of incorporation as a director. (Ex. AJ) The address of the corporation was listed as 135 Ridge Street, New York, New York, which is the same address as that given for taxpayers. (R. A14-a.)

The 2377 Creston Corporation engaged in a real estate business. It owned a building which it sold prior to 1965 at a profit. It reported gain from the sale on the installment method. Thereafter, it engaged in securities trading. (R. A14-a.)

In its corporation income tax return filed for calendar year 1965, the corporation reported income from the installment sale of a building in the amount of $117,184.19. (Ex. M) It reported taxable income of $70,859.70 before the dividends received deduction. The address shown on the return was c/o Geller, 135 Ridge Street, New York, New York. The return was signed by taxpayer as president. (R. A15.)

In its corporation income tax return filed for calendar year 1966, the corporation reported no installment income. It reported a taxable loss of $10,224.09. (Ex. N) The address shown on the return was c/o Geller, 135 Ridge Street, New York, New York. The return was signed by taxpayer as president. (R. A15.)

The corporation income tax returns for 1965 and 1966, were prepared by Mason S. Greenland, an accountant, from figures supplied by taxpayer. (Tr. 81-86.) No books of original entry were provided by the petitioner. Income and expenses were totaled before the information was given to Mr. Greenland for use in the preparation of the return. (R. A15; Tr. 81-86, 91.)

The balance sheets of the corporation as shown on its tax returns for 1965 and 1966 were as follows (R. A16; Exs. M, N):

Assets	12/31/64	12/31/65	12/31/66
Cash	$242,622.70	$ 12,128.48	$ -0-
Notes and accounts receivable	143,058.73	172,112.42	145,227.20
Other investments	85,120.93	44,987.90	-0-
Other assets	930.24	-0-	-0-
Total assets	$471,732.60	$229,228.80	$145,227.20

Liabilities and Capital	12/31/64	12/31/65	12/31/66
Long term mortgages and notes	$210,072.86	$ 52,282.86	$ -0-
Common stock	5,000.00	5,000.00	5,000.00
Surplus reserves	143,592.24	-0-	-0-
Earned surplus	113,067.50	171,945.94	140,227.20
Total liabilities and capital	$471,732.60	$229,228.80	$145,227.20

The change in the earned surplus figure on the balance sheet for 1965 was explained in the return as follows (R. A16; Ex. M):

Balance at beginning of year	$113,067.50
Net income per books	71,789.94
Total surplus available	$184,857.44
Less: Distributions	-0-
Federal income taxes for 1964	12,911.50
Balance at end of year	$171,945.94

There was no similar accounting in the 1965 return for the reduction in "surplus reserves" from $143,592.24 to zero.(R. A17.)

The corporation income tax return for 1965 shows that two officers were compensated during the year. (Ex. M) Murray L. Geller, taxpayer's son who was 24 years old in 1965, was listed as secretary at a salary of $7,000. Irwin (also known as "Irving" or "Isaac") Geller, taxpayer's son, who was 21 years old in 1965, was listed as president at a salary of $5,200. No compensation of officers was shown in the 1966 return. (R. A17.)

The 2377 Creston Corporation maintained a number of savings accounts during 1965. Taxpayer had the authority to withdraw such funds on his signature. During July, 1965, the following checks made payable to him were drawn on corporate savings accounts (R. A17):

Savings Institution	Date	Amount
West Side Federal Savings & Loan Association [(Ex. D)]	7/27/65	$ 2,501.34
Knickerbocker Federal Savings & Loan Association [(Ex. F)]	7/27/65	7,500.00
Knickerbocker Federal Savings & Loan Association [(Ex. G)]	7/30/65	3,084.18
Queens County Federal Savings & Loan Association [(Ex. E)]	7/30/65	1,981.67
Total		$15,067.19

Each of the checks carried the endorsement of William Geller followed by that of "Wolf Geller." They were also endorsed by the brokerage firm of Merrill Lynch, Pierce, Fenner & Smith. (R. A18.)

On June 17, 1965, taxpayer personally opened a brokerage account with the firm of Merrill Lynch, Pierce, Fenner & Smith (hereinafter referred to as Merrill Lynch) in the name of "Wolf Geller." (Tr. 56; Exs. 1A, 1B, 2B, 3C) The account executive at Merrill Lynch filled out a new account card on the basis of information furnished by taxpayer when the account was opened. (Tr. 56-57) The address listed for the account was 318 East 149th Street, Bronx, New York, which was the business address of taxpayer's brother, Morris Geller. The card listed taxpayer's net worth at $150,000. (R. A18; Ex. 1C.)

According to Merrill Lynch's deposit sheets, taxpayer made deposits of $203,612.78 to the account during 1965 and $24,151.25 during 1966. (Exs. 1A, 1B) Among the deposits

were the four checks representing withdrawals from the 2377 Creston Corporation savings accounts in July, 1965, and totalling (R. A18) $15,067.19. Bonds with a total cost of $203,992.38 in 1965 and $24,151.25 in 1966 were purchased for the account. (R. A19; Exs. 1A, 1B.)

The bonds purchased were New York City Housing Authority and New York State Dormitory Revenue bonds in bearer form with coupons attached. (Tr. 58-60.) Interest from such bonds is tax-exempt. On at least six occasions, the bonds were hand-delivered to taxpayer, who was usually accompanied by a young man. None of the bonds were resold through the Merrill Lynch account. (R. A19; Tr. 61-62.)

In his federal income tax returns for 1965 and 1966, taxpayer reported taxable income of $610.00 and $3,092.15, respectively. His income from the practice of medicine was reported as follows (R. A19):

	1965	1966
Gross receipts	$2,881.50	$4,951.00
Business deductions	- 2,881.50	1,858.85
Gross profit	-0-	$3,092.15

Taxpayer reported no dividend income in 1965 or 1966. The returns were prepared by Mason Greenland from figures supplied by taxpayer. No records were kept by taxpayer to show the source or disposition of deposits to the Merrill Lynch account. (R. A20.)

The Commissioner determined that taxpayer understated his income for the years 1965 and 1966 by $203,612.78 and $24,151.25,

respectively. (R. A3-A4.) After adjusting for other deductions, the Commissioner determined that taxpayer's additional tax liabilities for 1965 and 1966 were $111,123.57 and $5,598.89, with the additions to the tax for fraud imposed by Section 6653(b) of the Internal Revenue Code of $55,561.79 and $2,799.45, respectively. (R. A1-A2.) The liability of Doris Geller as joint maker was limited to the deficiencies computed without the additions to the tax imposed by Section 6653(b). (R. A2, A20.)

On February 15, 1968, taxpayer gave a sworn affidavit to the Commissioner. (Ex. Q) According to the affidavit, taxpayer stated (R. A20):

> To my knowledge this corporation (2377 Creston Corp) does not do any business as of now. * * * [T]he accountant was Albert Podrid. He did have important papers and records for this Corporation. During 1967, I asked him for the records. He told me that he destroyed them. It is my openion [sic] that he does have them but refused to give them to me. I did sign the income tax returns for this corporation. I have no knowledge was [sic] has happened to the Corporate assets. I do not have the information or records to complete the financial statement for the Corporation (Form 433-AB).

SUMMARY OF ARGUMENT

I

Taxpayer complains that the Commissioner did not prove the existence of the asserted deficiency by clear and convincing evidence which, taxpayer asserts, is required in a fraud case. Assuming that this is a requirement (the case authorities in this Circuit do not seem to bear it out), we submit that this standard of proof was in fact satisfied. The evidence that a large sum of money was withdrawn from a corporation controlled and managed by taxpayer and that approximately this amount turned up in taxpayer's hands and was deposited by him in a brokerage account in his name is sufficient to meet the Commissioner's burden of proof and to shift to taxpayer the burden of proceeding with credible evidence that these amounts did not constitute unreported income to him.

Moreover, it is not necessary that the Commissioner prove fraud as to the entire asserted deficiency but it suffices if it is shown that any part thereof is due to fraud. The evidence shows, and taxpayer concedes, that, in 1965, checks in the amount of $15,000 were issued to him on bank accounts of the corporation and that these amounts were withdrawn by him and deposited in the brokerage account. This concrete evidence of specific sums withdrawn by taxpayer from the corporation and over which he thereafter exercised dominion and control certainly, even if there were some doubt as to the balance of the asserted deficiencies, satisfies the most exacting test. When this is viewed together with the wealth of evidence of fraudulent intent on the part of

the taxpayer, it is beyond question that there was clear and convincing evidence of fraud as to this amount in 1965 and therefore fraud has been established as to that year, at least. This being so, the usual rules as to burden of proof applied with respect to the balance of the 1965 deficiencies and, in the absence of contrary credible proof by taxpayer, the presumption of correctness of the Commissioner's deficiency notice suffices to establish them.

II

Taxpayer also misses the mark in insisting that the decisions below should be set aside because, in a bank deposits case involving an allegation of fraud, the Commissioner is obliged to check all leads as to a possible non-income source and because the Commissioner's audit investigation herein failed to pursue to taxpayer's satisfaction an alleged lead (his brother) which taxpayer argues would have revealed that the funds in question belonged to his brother (or to some shadowy figure for whom taxpayer suggests his brother worked) and were not income to taxpayer. First, the cases are not in complete uniformity on this point, and it is not as clear as taxpayer would have it that, where civil fraud is involved, the Commissioner is obliged, even in a bank deposits case, to do more than show receipt by the taxpayer of apparent unreported income. But, the short answer is that, although the point was not made in the Tax Court, the type of evidence presented by the Commissioner at trial herein constitutes proof of specific items of unreported income and is

not truly a bank deposits (circumstantial proof) type of case. This Court, and others, have held that the Commissioner is not obligated to pursue possibly exculpatory leads in a specific items case. In that type of case, once the Commissioner has made a prima facie showing of unreported receipts in the taxpayer's hands which have the appearance of income, the burden shifts to the taxpayer to overcome this by a showing that the receipts were in fact not income. Hence, there was no obligation on the Commissioner to exclude the possibility that the funds belonged to the brother. But, in any event, the evidence shows that the examining agent did, in fact, make a reasonable effort to get information from the brother, but without success.

III

On the question of fraudulent intent, the nature of the conflicting contentions of the parties as to what happened to the funds which disappeared from the corporation (i.e., whether taxpayer or someone else had controlled the corporation, withdrawn from it the missing funds and deposited and controlled them in the brokerage account) required the Tax Court, as the necessary basis of decision with respect to the existence of the deficiencies, to find whether the taxpayer's exculpatory assertions of fact as to the handling of the amounts in question were true or false. Thus, the question as to whether there was a deficiency and the question whether any part of it was due to fraud are largely governed by the same factual issues. The court's conclusion that the taxpayer had in fact received

income necessarily involved the conclusion that he was not presenting a truthful account of events and that (the only alternative) the true nature of those events constituted an attempt on his part to conceal the facts from the Internal Revenue Service. Additionally, the fraud conclusion is strongly buttressed by the taxpayer's use, in opening the brokerage account, of a name (Wolf Geller), other than that used by him for business and tax reporting purposes; the fact that he initially denied that he was Wolf Geller in his Tax Court petition; his tendency to change his account of events in the course of the proceedings below; his denial of knowledge of circumstances of which he could scarcely have been ignorant; and his failure to keep and/or produce records of the events in issue.

ARGUMENT

THE TAX COURT DID NOT ERR IN CONCLUDING THAT TAXPAYERS WERE LIABLE FOR DEFICIENCIES IN TAXES AND FRAUD PENALTIES FOR 1965 and 1966

This is a civil tax suit in which the Tax Court determined that the taxpayer had substantially understated his reported taxable income for the years 1965 and 1966. The Tax Court sustained the Commissioner's determination that substantial unexplained deposits to taxpayer's stock brokerage account in these years constituted unreported income and that these deficiencies were in part, at least, due to fraud. Taxpayer now attacks the decision in the Tax Court (R. A43) on the following grounds:

1. That the court erred in failing to impose upon the Commissioner the burden of proving by clear and convincing evidence not only the fact of fraud (which taxpayer concedes, apparently, was correctly imposed on the Commissioner) but also the fact that the unreported income reflected in the notice of deficiency had in fact been received as income by the taxpayers;

2. That the evidence presented by the Commissioner failed to meet the clear and convincing evidence burden contended for by taxpayer;

3. That the court's finding of fraud is not supported by the evidence; and

4. That he is entitled to a decision in his favor (presumably a decision of no deficiency) on the ground that the Commissioner's investigation of his tax liability was inadequate.

We will deal with each of these contentions.

A. The Commissioner need only prove by clear and convincing evidence that some part of the asserted deficiency was due to fraud and he may then rely on the usual presumption of correctness as to the balance of the deficiency

Taxpayer does not appear to contest the general rule that the Commissioner's determination of a deficiency creates a presumption of correctness and that the taxpayer has the burden of proving that determination to be erroneous. United States v. Rindskopf, 105 U.S. 418 (1881); United States v. Lease, 346 F. 2d 696 (C.A. 2, 1965). Rather, he contends that, because the determination included an assertion of fraud, and application of the fraud penalty, as to which facet the burden is, concededly, on the Commissioner, the usual presumption of correctness of the determination of deficiency is set aside and the Commissioner bears the burden of proving by clear and convincing evidence not only the existence of fraud but that the unreported amounts in fact constitute income to taxpayer. Certain of the cases he cites in support (Br. 7-11), (e.g., Smith v. Commissioner, 23 T.C.M. 1661 (1964), and George v. Commissioner, 338 F. 2d 221 (C.A. 1, 1964)) do seem to announce this proposition. For the most part, however, the decided cases do not focus on this precise aspect of the problem and recite

the usual rules that the deficiency itself is deemed to be presumptively correct but that the Commissioner bears the burden of proof as to the fraud issue. For example, in the opinion of this Court in United States v. Lease, supra, where the fraud penalty was asserted and sustained by the jury, this Court, nonetheless, stated and applied (p. 700) the usual rule, with respect to the question whether the amounts in issue actually constituted income to the taxpayer, that the affirmative determination of the Commissioner was presumptively correct and that the taxpayer was required to overcome this. Application of the instant taxpayer's contention to the Lease case would have required that the Commissioner prove by affirmative evidence that at least some part of the asserted deficiency (any part found to be fraudulent in nature) was in fact income to the taxpayer. However, as noted, no such requirement seems to have been imposed and to that extent Lease seems to be authority contrary to taxpayer's position. See also Halle v. Commissioner, 175 F. 2d 500 (C.A. 2, 1949), cert. denied, 338 U.S. 949 (1950).

Assuming that the authorities are not in total agreement on the point in issue, we submit that the Court need not reach the question in order to affirm the decision below. It is well established that a given tax year deficiency is deemed to have been tainted with fraud if it is proved that any part of the deficiency for that year was due to fraud.

The statute itself (Sec. 6653(b), Appendix A, infra) so recites. See also Bahoric v. Commissioner, 363 F. 2d 151 (C.A. 9, 1966); Mauch v. Commissioner, 113 F. 2d 555, 557 (C.A. 3, 1940); Drybrough v. Commissioner, 238 F. 2d 735, 740 (C.A. 6, 1956).

In the instant case, the receipt by taxpayer of unreported income in 1965 in the amount of at least $15,000 is so clearly inferable from the record evidence that it is beyond question that it would satisfy the Government's burden in a criminal prosecution, let alone a civil fraud case.[3/] That this amount was drawn out of the corporation's bank account by taxpayer and deposited by him in the brokerage account in his name is shown through cancelled checks, records of the brokerage firm, etc. and is in fact admitted by taxpayer himself. This evidence and admission constitute clear and convincing evidence that taxpayer withdrew $15,000 from a corporation apparently dominated by him and deposited it in an account in his name and over which he then, of necessity, exercised dominion. The burden of proceeding then shifted to taxpayer to demonstrate that this apparent receipt of income by him was in fact something else. There is no need for the Commissioner to negate all suggested non-income explanations of these events since, whatever the merits of the authorities on which taxpayer relies for the proposition that the Commissioner has such a burden in one of the circumstantial evidence types of case (net worth, bank deposits, etc.),

3/ We do not mean to imply that the balance of the deficiency was not also proved by clear and convincing evidence as will be discussed infra. We merely point initially to the $15,000 item since it stands out so sharply and obviates any need to consider proof of fraud as to the balance.

we are dealing here with proof of a specific item of unreported receipts.[4/] The primary basis for charging income in this amount is not the mere fact that an unidentified amount of $15,000 was deposited by taxpayer in his account but the fact that four specifically identified checks totalling over $15,000 were withdrawn by him from the corporation and deposited in his account and not reported on his return. As this Court has held in United States v. Suskin, 450 F. 2d 596, 598 (1971), the requirement established in Holland v. United States, 348 U.S. 121 (1954) that "leads" which might establish a non-income character with respect to unidentified deposits be pursued by the Commissioner (i.e., in a true bank deposits or net worth case) does not apply where the Commissioner has presented evidence of a specific item of unreported income. See also Siravo v. United States, 377 F. 2d 469, 473 (C.A. 1, 1967), and United States v. Lacob, 416 F. 2d 756, 760 (C.A. 7, 1969), cert. denied, 396 U.S. 1059 (1970), where the courts made it clear, in criminal tax evasion cases, that, once the Government proves unreported receipts having the appearance of income, the burden then devolves upon the defendant to prove that they were of some other character, or that

4/ Although the deficiency notices of the years in question appeared to rest upon a bank deposits type of analysis in that mention was made only of the deposits and not the amounts withdrawn from the corporation, nevertheless the evidence introduced at trial established not only the deposits but the withdrawals from the corporation and constituted proof of specific items of unreported receipts by taxpayer. In United States v. Lacob, 416 F. 2d 756, 760 (1969), the Seventh Circuit affirmed a criminal conviction where the Bill of Particulars had referred only to specific items but the proof at trial was on the basis both of specific items and unexplained bank deposits.

they should be offset by expenditures also not reported in the return. Applying that concept to the facts of the instant case, the Commissioner having proved unexplained receipts having the appearance of income in the amount of at least $15,000, it then became the taxpayer's burden to attempt to satisfy the court that it should not be so treated. Taxpayer's vague and self-contradictory efforts to do so (see discussion, infra) were justifiably rejected by the court.

Because, on the basis of the receipt and use of the $15,000, the Commissioner had proved by clear and convincing evidence that some part of the asserted deficiency for 1965 was the result of fraud, the statutory consequences of such a showing (application of the 50-percent fraud penalty and removal of the defense of the statute of limitations for that year) are mandated. As to the balance of the deficiencies asserted by the Commissioner for that year, the usual rules obtain and the deficiencies are established by force of the presumption of correctness since the taxpayer failed to satisfy the court through credible evidence that the assertion is incorrect.

B. In any event, the Commissioner introduced evidence as to the entire asserted deficiency for each year in question which constituted clear and convincing evidence of unreported income

We have, in Point A, supra, used the $15,000 item as the obvious demonstration that the Commissioner has made the necessary showing to satisfy his burden with respect to a year in which fraud is asserted. Although the balance of the asserted

deficiencies are possibly not so sharply in focus, the circumstances and the basis of prcof are essentially the same and, we submit, also meet the clear and convincing test, although, as shown, this is unnecessary in order to sustain the decision below, at least with respect to 1965. Indeed, the evidence so clearly meets the test, at least in the absence of any credible explanation by taxpayer, that the Tax Court could not have reached any conclusion other than it did. Cf. Kreps v. Commissioner, 351 F. 2d 1, 7-8 (C.A. 2, 1965).

First, the full amount of the deficiencies constitute more nearly a specific items type of situation than a bank deposits case. The corporation was not pointed to as merely a likely source of the deposits to the brokerage account. The investigation actually commenced with the corporation (R. 109) and was concerned with the specific amounts aggregating approximately $230,000 which had been withdrawn from the corporation over the 1965-1966 period. The inquiry was an effort to determine who had received these amounts and whether it had been reported as income by the recipient. The discovery of the brokerage account and the deposits thereto by taxpayer--the same party apparently in control of the corporation--provided the obvious answer as to what had happened to these amounts and justified their treatment as income to him in the absence of a credible showing by him that they were received and held by him in some other capacity. Indeed, taxpayer does not seem to contest that the amounts deposited to the account came from the corporation nor

that they constitute income to whomever exercised dominion over the withdrawal and use of these funds. He merely suggests (as we understand his rather confusing and inconsistent explanations) that, as to the amounts in excess of the $15,000, the withdrawal and deposit was effected by someone else and that, as to the $15,000, he was merely a conduit. The only real issue before the Tax Court, then, was whether the court believed taxpayer's exculpatory explanation that someone other than he had withdrawn the bulk of the funds from the corporation and deposited them in the account and exercised dominion over the funds therein to purchase bearer bonds.

Even viewed as a bank deposits case, the evidence satisfied any test imposed upon the Commissioner. Cf. Halle v. Commissioner, supra. Under this method, if substantial amounts are shown to have been deposited by taxpayer to his account during a given year in excess of receipts accounted for on his return for that year, the amounts are treated as unreported income of the taxpayer during the year in question, except to the extent that the taxpayer can show the deposits to have been made from a non-income source. Halle v. Commissioner, supra; Goe v. Commissioner, 198 F. 2d 851 (C.A. 3, 1952). Where, in addition, the Commissioner is able to show a likely source for the deposits and receipt from that source would probably have the character of income, the force of the bank deposits showing is enhanced still further. Lewis v. Commissioner, P-H Memo T.C., par. 57,158 (1957). Here, the

Commissioner introduced evidence that the taxpayer, on June 17, 1965, personally opened a brokerage account with the firm of Merrill Lynch, Pierce, Fenner & Smith in the name of "Wolf Geller" (Tr. 56; Exs. 1A, 1B, 2B, 3C)--a name which taxpayer now admits (Br. 38) was his "rightful name" in the Hebrew form. It was further established on the basis of the deposit sheets of the brokerage firm that deposits were made into this account in the year 1965 in the amount of $203,612.78 and, during 1966, in the amount of $24,151.25. (Exs. 1A, 1B.) Taxpayer concedes the accuracy of this showing with respect to the $15,000. A disinterested witness, Marvin Brown, the brokerage firm account executive in charge of taxpayer's account, also testified with certainty that, telephone orders were given for purchase of bonds by a person identifying himself as taxpayer, and that the taxpayer would appear in person a few days later when the bonds were ready for delivery and pick them up (R. A90). Although on cross-examination, the taxpayer attempted to prompt the witness to say that it might have been someone else who picked up the bonds, or that they were sometimes delivered by mail, the witness insisted (R. A92, A94, A96-A97) that it was the taxpayer who had picked up at least the bulk of them personally, and that out of about a dozen such transactions, the taxpayer had made personal pickup on at least six to nine of these occasions. While taxpayer now, on brief (p. 15), seeks to transmute this testimony into an affirmative assertion that there were up to six occasions on which somebody else picked up the bonds, the

true sense of the witness' testimony was that he remembered no occasion on which the bonds were picked up when taxpayer was not present at the pickup, and that he was certain that this was the situation on at least the bulk of such occasions.[5/] Certainly this was enough to support the inference drawn by the Tax Court that the taxpayer exercised personal dominion over the account, was responsible for the deposits made thereto, and controlled the disposition of the bonds he purchased and received through the account. And the court expressly stated (R. A94) that he found the witness' testimony more credible than the denials by the taxpayer.

Additionally, the Commissioner showed through evidence that the taxpayer, together with his wife and sister, incorporated in 1950 the 2377 Creston Corporation, and that each was named as a director therein. (Ex. AJ.) The corporate address was the same as that of taxpayer (R. A14-a). In its corporate tax return for the year 1965, the corporation reported taxable income in the amount of $70,859.70 (R. A15), again giving as its address the address listed for taxpayer. The return was signed by taxpayer as president of the corporation. For 1966, the corporation

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5/ Taxpayer professes to wonder (Br. 15) why the Commissioner did not produce the delivery slips signed by the party picking up the bonds. Since many other detailed brokerage documents were produced at trial, it would appear such slips were unavailable to the Commissioner or they would also have been introduced. However, we ask in turn why taxpayer, contesting vigorously that he was the person controlling the bonds, and confronted with the testimony of Mr. Brown that he was that person, made no effort to produce the slips if they were available at the time of trial, and if they would have sustained his contention that he was not the person to whom they were delivered.

reported a taxable loss with the same signature and address. (R. A15.) These corporate returns were prepared by an accountant from figures supplied by taxpayer. (Tr. 81-86.) The corporate balance sheets, accompanying its returns for the two years in question, reflected a reduction in assets during 1965 of approximately $242,000, with a drop in cash on hand of approximately $230,000. For 1966, it showed a further reduction in assets of approximately $85,000 and reduction of cash on hand of about $12,000. (R. A16; Exs. M, N.) The corporation maintained a number of savings accounts during 1965 and taxpayer had the authority to withdraw the funds from such accounts on his signature. During July, 1965, checks payable to taxpayer were drawn on these savings accounts in the aggregate amount of $15,067, carried the endorsement of taxpayer as "William Geller" followed by that of "Wolf Geller" and were further endorsed in the name of the brokerage firm, indicating that they had been deposited with that firm. (R. A18.)

From these facts, the Commissioner contended, and the Tax Court agreed, it was properly inferable that the taxpayer had exercised dominion and control over the amounts deposited to the brokerage account (i.e., the amount of the asserted deficiencies) and that these amounts constituted unreported income to him, the likely source being the otherwise unexplained reduction in the assets and cash holdings of the corporation apparently wholly dominated and operated by taxpayer. This body of evidence is as strong as that appearing in cases such as Halle v. Commissioner, supra, and Goe v. Commissioner, supra,

where fraud was a factor[6/] but, nevertheless the findings of the Tax Court with respect to the fact and amount of unreported income was affirmed. In Halle, this Court noted (p. 503) that, in the face of evidence of substantial bank deposit activity in excess of reported income, the taxpayer and his wife had "introduced little or no genuine evidence to explain the large sums of money deposited in the bank and brokerage accounts." The Court futher quoted (p. 503) from the opinion of the Fourth Circuit in Harris v. Commissioner, 174 F. 2d 70, 73 (1949), where fraud was involved and relied upon to overcome the limitations bar, to the effect that an important support for the findings of deficiency was the failure of the taxpayer to produce any books and records, or to render assistance to the court in making its findings. See also on this score Furnish v. Commissioner, 262 F. 2d 727 (C.A. 9, 1958); Estate of Upshaw v. Commissioner, 416 F. 2d 737 (C.A. 7, 1969); Bryan v. Commissioner, 209 F. 2d 822 (C.A. 5, 1954); Bahoric v. Commissioner, supra; Greenfeld v. Commissioner, 165 F. 2d 318, 319 (C.A. 4, 1947).

On the basis of the above, the Commissioner introduced clear and convincing evidence in support of his determination that the amounts underlying the deficiencies asserted for both 1965 and 1966 were received by taxpayer and constituted income to him. This is so whether the presentation is viewed as a specific items showing or a bank deposits case.

6/ In Goe, fraud was not only in issue but, as here, was relied upon by the Commissioner to prevent assertion by taxpayer of a statute of limitations defense.

C. The Commissioner's investigation met all requirements of law

Taxpayer errs in demanding (Br. 26 et seq.) that the decision below be reversed because of alleged deficiencies in the Commisioner's investigation of his case. First, his argument is based on the assumption that the decision is based on a bank deposits presentation. As we have shown, supra, the evidence adduced at trial was essentially a specific items type of showing as to which the alleged requirements do not obtain. But, even assuming this to be a bank deposits case, taxpayer errs additionally since, contrary to his assertion (Br. 26), there is no fixed requirement that the Commissioner negative all reasonably possible non-income sources as a condition of asserting deficiencies on the basis of one of the circumstantial methods of reproducing income. In Holland v. United States, 348 U.S. 121 (1954), the Supreme Court provided alternatives: the Commissioner must either negative nonincome sources or demonstrate a likely source of taxable receipts. See also United States v. Massei, 355 U.S. 595 (1958). In the instant case, a likely source was shown--the corporation. That is all that was required.

Moreover, the taxpayer's suggestion that the bearer bonds went to his brother, Morris (the only "lead" suggested by taxpayer), is totally irrelevant, even if true. The controlling question is who had dominion over the funds which were used to buy those bonds and thus had the right and power to determine whether they

would be so used and to whom any bonds purchased therewith would go. The apparent source of the funds was the corporation and taxpayer does not question that this is so. He merely denies that (other than for the $15,000) he was the one who withdrew the funds from the corporation and deposited them. Even this may be of little significance in view of the fact that the brokerage account was in his name and controlled by his signature. Whoever physically deposited the funds (and the Tax Court found that, as to the bulk of them, the taxpayer was the depositor), the deposit made them subject to his control and the critical fact for purposes of fixing tax liability was whether he exercised this control for himself (including decisions to make gifts--if, indeed, the bonds went to the brother) or whether he acted simply as the agent for another who made the real decisions as to the use of the funds in the account. Therefore, the so-called "lead" that the bearer bonds were being delivered to Morri was with respect to a matter of at best secondary significance.[7/] The evidence was clear and convincing that the funds in the account were under taxpayer's real and apparent

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7/ At one time or another (see, e.g., Br. 24) taxpayer has intimated (albeit he has made no specific assertion) that his brother Morris was also somehow the controlling figure in the corporation. First, there has never been any indication whatsoever, apart from taxpayer's self-serving assertion, that Morris ever had anything to do with the corporation. Moreover, the taxpayer has consistently asserted that Morris was both ill and mentally retarded (e.g., R.A69). See also the explanation in taxpayer's brief in the Tax Court (the page in question is attached hereto as Appendix B, infra) that (1) Morris was himself a mere conduit or agent and was acting for a shadowy "Mr. Klein" who had employed Morris and at whose

control (in which event they would certainly constitute income to him) and it was his obligation to come forward with evidence to show that what clearly appeared to be so was in fact not so. Given the record facts and findings of the Tax Court, it is inconceivable that, if someone other than himself was the real party in control of the removal of the funds from the corporation and the deposit in the account, taxpayer would not know exactly who that person was and the circumstances of the control by the latter. This is precisely what the Tax Court told the taxpayer his position was when it warned him (R. 103) that the testimony of Mr. Brown had put the money in taxpayer's pocket, that the monkey was on his back and that he had better come up with some answers. Taxpayer had no satisfactory answer.

7/ (continued)
instructions all of these transactions were carried on and (2) that taxpayer had undertaken to handle the funds and open the account, etc. simply to help his brother keep his job since Morris' mental limitations would have prevented him from performing these tasks even under explicit instructions from "Mr. Klein". It is worthy of wonderment how taxpayer could have expected the agent to take seriously his suggestion that his brother was the actual controlling figure behind the corporation and its assets and that taxpayer was merely a messenger boy in the face of these other statements that Morris was so limited mentally that taxpayer had had to step in and perform these minsterial tasks for him. We also think worthy of note the manner in which the mysterious "Mr. Klein" steps in and out of taxpayer's shifting stories, being never mentioned by taxpayer in his testimony and courtroom assertions, being made the moving force behind the chain of transactions in taxpayer's post-trial brief in the Tax Court and largely disappearing again in taxpayer's brief in this Court, other than for a single cryptic reference (p. 24) to "another background figure" who, together with Morris, was alleged to control the corporation's assets and the brokerage account.

D. The Commissioner showed fraud by clear and convincing evidence

While, as the Tax Court observed in its opinion (R. A26), a mere understatement of income is usually insufficient to establish fraud "because the intent of the taxpayer to evade taxes must be affirmatively established," the manner in which the issue as to receipt of income is drawn in some cases, such as the one at bar, virtually ties the two together so that a supportable finding of income provides at the same time a supportable finding of fraud. Thus, here, taxpayer's contention that he had not received income in the amount in question rested in large part on his denial of the facts (as to which he could not have been honestly mistaken) that he did not withdraw from the corporation any amounts in excess of the admitted $15,000, that he did not deposit such amounts in the brokerage account and that he did not personally pick up the bonds purchased therewith. If he was untruthful with respect to these statements, it constituted a willful and fraudulent attempt to conceal the fact of his receipt and possession of these amounts and this alone is more than sufficient to support the court's finding of fraud. The court found, contrary to taxpayer's testimony, that he had received and deposited these amounts and it stated that it believed the testimony of the witness, Brown, which contradicted taxpayer's denial that the bonds had been delivered to taxpayer. In view of this, the court could hardly have

concluded other than that the nonreporting of these amounts was fraudulently motivated.[8/]

Additionally, the purpose to evade taxes and to conceal the true nature of the matter was evidenced by taxpayer's opening and holding of the brokerage account in a name (Wolf Geller) other than the one by which he otherwise conducted his business and filed his tax returns (cf. Furnish v. Commissioner, supra; Greenfeld v. Commissioner, supra at 320), his original denial on his Tax Court petition that he was Wolf Geller, his changes of story during the course of the trial,[9/] his persistent denial of knowledge of events and circumstances of which, in light of the record facts, it is difficult to believe that he could have been in ignorance, his failure to keep (or at least to produce) records of the critical events, etc., and these all combine to support and compel the finding of fraud.

Taxpayer's attempted explanations of certain of the above indicia of fraud are patently without merit and, indeed, add to the aura of untruthfulness. For example, taxpayer argues (Br. 40-42) that the statement in his Tax Court petition that he was not "Wolf Geller" was not an attempt to deny his connection

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8/ Taxpayer's complaint (Br. 34-35) that the Tax Court relied on Exhibit S which was not admitted into evidence misses the point that the exhibit was excluded (R. A116-A117) precisely because it (a conference report) reflected taxpayer as saying nothing other than what he was stating and testifying to at the trial and was therefore unnecessary to support the findings ultimately made by the court.

9/ See the Tax Court's account of this (R. A34-A40).

with the brokerage account but merely to convey the information that he held ownership of the account only as a nominee. If that were in fact the intent, it was an incredibly poor choice of words. It would have been simple enough to have stated that "I William Geller, opened and held the account in the name of Wolf Geller as nominee for the benefit of" whomever he chose to name as the real beneficiary. The actual statement made constitutes a flat denial that he was Wolf Geller and, if believed, would have freed him of any need to explain his holding of the account in that name or his connection with the funds deposited in that account.[10/]

Of similarly dubious credibility is taxpayer's explanation (Br. 38-39) that the account was in fact opened in the name of "Wolf Geller" in order to signify that the funds in the account did not belong to taxpayer but to others. The more appropriate way to avoid confusion would have been to open the account in the name of the actual owner (it should be noted in this connection that it is part of taxpayer's factual position that the withdrawals were by others and for the benefit of others (Br. 2), and there would, thus, have been no need for taxpayer to be able to make withdrawals in his own name) or in the name

10/ Moreover, in the Tax Court, the taxpayer gave a different and incompatible explanation of this statement, asserting in his main brief in that court (App. B, infra), but without supporting testimony of his wife, that the petition had been prepared by his wife because he had at that time been disabled and that she had included the statement in question because she did not know that "Wolf" was his Hebrew name. This story implicitly concedes that the intent was to deny a connection between William Geller and Wolf Geller but relies on the premise that the denial was made in innocent error. (However, taxpayer never denied that he had read the petition before signing it.)

William Geller but labelled clearly as a trustee account. The difficulty with these normal procedures is that it would have vested ownership rights in someone else and created problems for taxpayer if, as the court below found, the account was maintained by taxpayer in his own behalf. On the other hand, use of the name "Wolf Geller" obviated the possibility of having to account to any other person in connection with the account and would certainly reduce the likelihood that the Internal Revenue Service would connect it up with the taxpayer, William Geller.[11/]

For the above reasons, the finding of fraud was well supported in the record evidence which met the "clear and convincing" test.

11/ Whether or not Wolf Geller was truly taxpayer's Hebrew name (see taxpayer's Br., pp. 38-39) is totally irrelevant to the issue. It is not the name taxpayer used in his business affairs nor was it the name used in his tax returns. While it might have been less completely effective to cut off any apparent connection between the account and the taxpayer than if the account had been held in the name "John Smith", the fact that taxpayer could have used even more effective concealment methods doesn't remove from a more tentative method the character of fraud if concealment was the purpose.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed. However, if this Court should conclude that any of the allegations of error advanced by taxpayer have merit, it would be inappropriate to direct decision in favor of taxpayers, as they request; rather the Court should remand for further proceedings and/or taking of further evidence so as to correct the error.

Respectfully submitted,

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FEBRUARY, 1977

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 28th day of February, 1977, in an envelope with postage prepaid, properly addressed to him as follows:

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APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6653. FAILURE TO PAY TAX.

* * *

(b) Fraud.--If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * * .

* * *

 Part 1

APPENDIX B

On or about June 4, 1973 I, William Geller, directed my wife, Doris Geller, to make a petition to the U.S. Tax Court. The reason I asked her to do it was I suffered a paralytic stroke and was mentally and physically not able to do it myself. My Hebrew name is Wolf Geller. She was not aware of this fact and she stated that my name is not Wolf Geller. The name of Wolf Geller was used by me to differentiate the stock and bond transactions for my brother Morris Geller whose address was 318 West 149th Street, New York, New York. My brother Morris Geller was mentally backward. His education did not go beyond the third grade of public school. He could hardly read or write. It appears to me that he was hired by a Mr. Klein to be a front man. My brother could not get a job. When he did get this job from Mr. Klein I felt obligated to help him and to act act for him.

Morris Geller received orders as to what purchases to make. His orders were to open an account with Merryl Lynch and to buy certain bonds. I being a medical doctor and knowing the mental and physical dapabilities of my brother Morris open the account for him. He ordered these securities, and he picked them up or they were delivered to him by mail at his address 318 East 149th Street, New York, New York.

The account with Merryl Lynch in the name of Wolf Geller was not my account. The Exhibits 1-A, 2-B, and 3-C do not proove my involvement in this case. The address is 318 East 149th Street, New York, New York. All the mail was delivered there to Morris Geller. I William Geller, never had an office there and I never resided there.